NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

HUGHES CUSTOM BUILDING, L.L.C. and JOHN HUGHES and AMALIA PINERES, M.D., husband and wife, Plaintiffs/Appellants, v. JAMES DAVEY and JAMES DAVEY and ASSOCIATES, INC., Defendants/Appellees.	2 CA-CV 2008-0103 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CV20020295

Honorable R. Douglas Holt, Judge

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

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B R A M M E R, Judge.

¶1 Appellants Hughes Custom Building, L.L.C., John Hughes, and Amalia Pineres (collectively, "Hughes") appeal from the trial court's grant of summary judgment in favor of appellees James Davey and James Davey and Associates, Inc. (collectively, "JDA"). Hughes argues the court erred in applying the economic loss doctrine to bar its tort claims against JDA and in concluding it lacked standing to assert certain damages.

¶2 In our May 7, 2009, opinion we affirmed in part, reversed in part, and remanded the case to the trial court, determining that the economic loss rule did not preclude Hughes's tort action and that Hughes had standing. *See Hughes Custom Building, L.L.C. v. Davey*, 221 Ariz. 527, 212 P.3d 865 (App. 2009). Our supreme court granted JDA's petition for review of that decision and remanded the case to this court for our reconsideration in light of its recent decision in *Flagstaff Affordable Housing, Ltd. Partnership v. Design Alliance, Inc.*, 223 Ariz. 320, 223 P.3d 664 (2010). Upon reconsideration, we withdraw our earlier opinion and replace it with this memorandum decision. We again affirm in part, reverse in part, and remand the case to the trial court.

Factual and Procedural Background

¶3 We view the facts in the light most favorable to the party opposing summary judgment and draw all reasonable inferences arising from the evidence in favor of that party. *See Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). JDA is a civil engineering firm that had performed various engineering services at the Sunset View real estate subdivision in Globe, Arizona, under a contract with the subdivision's developers. In 1997, Hughes purchased two lots in the subdivision

and constructed houses on those lots. In 1999, Hughes sold one of the houses to James and Mary Bernstein, and in 2001 sold the other to Brian and Lindy Francom.

¶4 In 2004, the Bernsteins sued Hughes and JDA for breach of implied warranty, breach of contract, negligence, and unjust enrichment, alleging, inter alia, that "improper compaction of the subdivision land [had] resulted in soil subsidence and structural damage" to their house. In 2005, Hughes and the Bernsteins settled and, pursuant to the settlement agreement, the Bernsteins' claims against JDA were dismissed with prejudice. The settlement agreement also provided that Hughes would transfer a house, also located in the Sunset View subdivision, to the Bernsteins and that the Bernsteins would "transfer title and possession of [the home they had purchased from Hughes back] to [Hughes]." In 2003, the Francoms filed a complaint against Hughes with the Arizona Registrar of Contractors, asserting the house they had purchased from Hughes had sustained structural damage from excessive settling. The Registrar revoked Hughes's license, finding that, although Hughes initially had attempted to correct the damage caused by settling and to prevent further damage, Hughes had failed to respond appropriately after the Registrar had issued a "Corrective Work Order."

¶5 In 2002, Hughes filed an action against the City of Globe, which had approved the subdivision plat before he purchased the lots, asserting the City negligently had approved the subdivision and provided incorrect information regarding the "excavation, fill and compaction" of the subdivision lots. Hughes later amended its complaint to include a "malpractice" claim against JDA. In 2004, the trial court granted

the City's motion for summary judgment, concluding the economic loss doctrine prevented Hughes from recovering from the City and, in any event, Hughes had not filed a notice of claim or his action within the time limits prescribed by A.R.S. §§ 12-821 and 12-821.01(A).

¶6 In 2006, Hughes filed a second amended complaint, asserting a negligence claim against JDA alleging it had breached its duty both to "ensure that the subdivision lots could be used for the construction of single family residences," and to determine whether the lots "met minimum requirements for compact and soil expansion," and that it also had failed to "advise the public . . . of any conditions that would prevent the development of the lots as reasonably anticipated." Hughes also alleged JDA had breached an implied warranty "that [it had] exercise[d] [its] skill with care and diligence and in a reasonable, non-negligent manner" in performing its contract with the subdivision developers. Hughes asserted as damages "[p]ast and future lost income," "[e]xpenses incurred in an attempt to prevent further subsidence," "[p]enalties imposed by the Arizona Registrar of Contractors," "[l]iability incurred by [Hughes] to the purchasers of the residential structures," "[d]amages paid to the purchasers of the residential structures," and "[a]ttorney fees and costs."

¶7 JDA filed a motion for partial summary judgment, asserting Hughes did not have "standing to bring an action seeking the lost value" of the houses sold to the Bernsteins and Francoms "or the costs to demolish [them]." JDA argued that, in order to have standing, Hughes had to prove it had sustained "particularized injuries," and could

not do so because neither the Bernsteins nor the Francoms had assigned to Hughes any potential claims they might have had against JDA. Hughes responded that it "ha[d] not filed this action on behalf" of the homeowners, but instead sought compensation for its own losses, which "include[d] the damages Hughes must pay to the Francom[s] for breach of the implied warranty of habitability and for the loss of the value of the . . . home [Hughes] [had] given to the Bernstein[s] to satisfy the judgment obtained by the Bernstein[s] against Hughes." The trial court granted JDA's motion and instructed JDA to "prepare findings of fact and conclusions of law to present to the Court for signature." The court signed JDA's proposed "findings of fact and conclusions of law,"[1] which stated the statute of limitations barred any potential claims the Francoms might have had against JDA, the Francoms and Bernsteins had not assigned any claims to Hughes and, thus, Hughes "had no standing to assert as damages the alleged lost value" of either house.

¶8 JDA subsequently filed two more motions for partial summary judgment, asserting the economic loss doctrine as a bar to Hughes' negligence and breach of implied warranty claims. The trial court granted both motions and, again, adopted JDA's proposed findings of fact and conclusions of law. Relying on *Carstens v. City of Phoenix*, 206 Ariz. 123, 75 P.3d 1081 (App. 2003), the court concluded the economic

[1]It is not entirely clear if, by requesting and signing "findings of fact and conclusions of law," the trial court sought to resolve disputed facts or merely to recite undisputed facts. Of course, the court may not resolve factual disputes in summary judgment, but instead must view the facts and evidence presented in the light most favorable to Hughes. *See Sanchez v. City of Tucson*, 191 Ariz. 128, ¶ 7, 953 P.2d 168, 170 (1998). We therefore confine our review to the parties' respective statements of facts and any evidence produced in support of those statements.

loss doctrine precluded Hughes's claims because Hughes had "not allege[d] any personal injury or secondary property loss resulting from JDA's alleged negligence [or breach of implied warranty]." The court entered final judgment in favor of JDA, awarding it $3,390.80 in costs. This appeal followed.

Discussion

¶9 Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A court should grant summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review de novo whether there are any genuine issues of material fact and whether the trial court applied the law properly. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007).

Economic Loss Doctrine

¶10 Hughes argues the trial court erred in ruling the economic loss doctrine precluded recovery on its negligence claim.[2] The economic loss doctrine, if applicable,

[2]Based on the economic loss doctrine, the trial court granted summary judgment in favor of JDA on Hughes's claim of negligence and its claim of breach of implied warranty. Hughes appealed from the final judgment "grant[ing] [JDA's] three Motions for Summary Judgment." On appeal, however, Hughes limits its discussion of the economic loss doctrine to its negligence claim. Thus, Hughes has waived its claim of breach of implied warranty and we do not address it. *See In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 15, 32 P.3d 39, 43-44 (App. 2001).

precludes a party from recovering in tort if the party has suffered only an economic loss and, therefore, should pursue its remedy in contract instead of in tort. *See generally Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 143 Ariz. 368, 376-79, 694 P.2d 198, 206-09 (1984), *abrogated on other grounds by Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 111 P.3d 1003 (2005); *Carstens*, 206 Ariz. 123, ¶ 10, 75 P.3d at 1083-84. We review de novo the court's determination and application of the scope of the economic loss doctrine. *Flagstaff Affordable Hous.*, 223 Ariz. 320, ¶ 9, 223 P.3d at 666.

¶11 It is undisputed that Hughes and JDA had no contractual relationship. Our supreme court clarified in *Flagstaff Affordable Housing* that the economic loss doctrine does "not apply to negligence claims by a plaintiff who has no contractual relationship with the defendant." *Id.* ¶ 37. The court noted that "[t]he principal function of the economic loss doctrine, in our view, is to encourage private ordering of economic relationships and to uphold the expectations of the parties by limiting a plaintiff to contractual remedies for loss of the benefit of the bargain." *Id.* ¶ 38. The court further observed that those "concerns are not implicated when the plaintiff lacks privity and cannot pursue contractual remedies." *Id.* We agree with the parties that, in light of our supreme court's recent decision, the economic loss doctrine does not bar Hughes's negligence claim. Thus, the trial court erred in granting JDA's motions for summary judgment on that basis.

¶12 JDA argues, however, that we nonetheless may affirm the trial court's ruling because JDA owed Hughes no duty. Although the existence of a duty "is a matter of law for the court to decide," *Gipson v. Casey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007), JDA did not raise this argument either in the trial court or its opening brief on appeal. It instead raises this issue for the first time in a supplemental brief we ordered filed after the supreme court remanded the matter to us for our reconsideration. We therefore conclude JDA has waived this argument and we decline to address it further.[3] *See Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159, ¶ 52, 171 P.3d 610, 622 (App. 2007) (court generally does not consider issues raised for first time on appeal); *see also Dawson v. Withycombe*, 216 Ariz. 84, n.11, 163 P.3d 1034, 1050 n.11 (App. 2007) (argument not raised in opening brief waived on appeal).

Standing

¶13 Hughes next contends the trial court erred in finding it lacked standing to assert as damages the lost value of the Bernstein and Francom houses. Hughes asserts, as it did below, that it "has demonstrated distinct damages resulting from JDA's negligence"

[3]In support of its argument that it owed no duty to Hughes, JDA points to our supreme court's statement in *Flagstaff Affordable Housing* that "[r]ather than rely on the economic loss doctrine to preclude tort claims by non-contracting parties, courts should instead focus on whether the applicable substantive law allows liability in the particular context." 223 Ariz. 320 ¶ 39, 223 P.3d at 671. The court noted, for example, that "whether a non-contracting party may recover economic losses for a defendant's negligent misrepresentation should depend on whether the elements of that tort are satisfied, including whether the plaintiff is within the limited class of persons to whom the defendant owes a duty." *Id.* But nothing in *Flagstaff Affordable Housing* can reasonably be read to change the law applicable to whether JDA owed a duty to Hughes. Thus, there is no reason JDA could not have raised this argument in the trial court.

because Hughes is liable to the Francoms and Bernsteins for the damage the soil subsidence caused to their houses. We review de novo whether a party has standing to sue. *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, ¶ 16, 81 P.3d 1016, 1021 (App. 2003).

¶14 To establish standing, a plaintiff must demonstrate "a distinct and palpable injury," but "[a]n allegation of generalized harm that is shared alike by all or a large class of citizens" is generally insufficient to do so. *Sears v. Hull*, 192 Ariz. 65, ¶ 16, 961 P.2d 1013, 1017 (1998); *see also Bennett v. Brownlow*, 211 Ariz. 193, ¶ 17, 119 P.3d 460, 463 (2005) ("To establish standing, we require that petitioners show a particularized injury to themselves."). The injury may be economic or otherwise. *Aegis of Ariz.*, 206 Ariz. 557, ¶ 18, 81 P.3d at 1021.

¶15 JDA does not cite, nor do we find, any authority suggesting that expenses a plaintiff has incurred—or with sufficient certainty will incur—in the course of fulfilling a legal obligation to another party is not a particularized injury sufficient to confer standing when the legal obligation arose because of the defendant's negligence.[4] *Cf. County of*

[4]JDA relies on comment (a) of § 912 of the Restatement (Second) of Torts (1979), which states:

> When one seeks to recover damages for a particular harm that he claims has resulted to his person or to a tangible thing belonging to him, he has the burden of proving that the other has invaded a legally protected interest of his, that he has suffered the harm and that the act of the other was a legal cause of the harm.

Mille Lacs v. Benjamin, 262 F.Supp.2d 990, 997-98 (D. Minn. 2003) ("potential liability stemming from a filed complaint can be sufficient to create standing" but not "amorphous threat of future liability"); *Seymour v. Holcomb*, 7 Misc.3d 530, 790 N.Y.S.2d 858, 862 (N.Y. Sup. Ct. 2005) (no standing where party's "contention that it is exposed to potential liability for money damages is unsupported"). Nor do we find authority suggesting that when the third party may have a cause of action against either plaintiff or defendant it must assign its claims to the plaintiff in order for the plaintiff to have standing to sue based on its liability to the third party.

¶16 As Hughes has explained, it is not asserting the lost value of the houses as damages on behalf of the Bernsteins or Francoms. Hughes instead seeks its own damages based on Hughes's responsibility to the homeowners for the lost value of and damage to their homes caused by JDA's negligence.[5] This is a sufficient particularized harm to provide Hughes standing to assert as damages the houses' lost value for which it is liable. We do not resolve here whether Hughes will be able to prove it is, in fact, liable

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But that section of the Restatement discusses the level of certainty required to prove damages and does not suggest that standing in a tort action is limited to harm to the plaintiff's person or to tangible property the plaintiff owns. Standing only requires a particularized injury, economic or otherwise.

[5]We note that it arguably may have been more appropriate for Hughes to file an action against JDA for indemnity or contribution. *See* A.R.S. § 12-2501 (defining contribution rights between tortfeasors); *A.I.D. Ins. Servs. v. Riley*, 25 Ariz. App. 132, 136, 541 P.2d 595, 599 (1975) ("The doctrine of indemnity rests upon the proposition that when one is compelled to pay money which in justice another ought to pay, the former may recover of the sums so paid, unless the one making the payment is barred by the wrongful nature of his conduct."). But JDA has not argued Hughes was required to do so in order to assert these damages. Accordingly, we do not address this issue.

for the full value of the houses and has compensated—or will have to compensate—the homeowners for that value. Those issues were not presented by JDA's motion for summary judgment and we do not consider them. *See generally* Restatement (Second) of Torts § 910 (1979) ("One injured by the tort of another is entitled to recover damages from the other for all harm, past, present and prospective, legally caused by the tort."). Hughes will, of course, have to demonstrate each element of its negligence claim: "the existence of a duty owed, a breach of that duty, and damages causally related to such breach." *Smethers v. Campion*, 210 Ariz. 167, ¶ 12, 108 P.3d 946, 949 (App. 2005).

Disposition

¶17 For the reasons stated, we reverse the trial court's grant of summary judgment in favor of JDA on Hughes's negligence claim and its ruling that Hughes lacked standing to bring the damages action. We affirm the trial court's grant of summary judgment on Hughes's implied warranty claim because Hughes has waived that issue on appeal. We remand the case to the trial court for proceedings consistent with this decision.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge